89-761

No. _____

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
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In the

Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD E. RICE,

Petitioner

v.

OHIO DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a denial to a public employee of a promotion due to his political beliefs or political affiliation violates the First and Fourteenth Amendments.

2. Whether conditioning a promotion of a public employee upon the political support of, or financial contribution to, a favored political party violates the First and Fourteenth Amendments.

3. Whether retaliation against a public employee because, acting in his self-interest, he filed a charge regarding a matter of public concern-reverse discrimination in the preferential treatment of a female employee - violates the First and Fourteenth Amendments.

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioner:

EDWARD E. RICE, a public employee with the Ohio Department of Transportation, a state agency.

Respondents:

DAVID L. WEIR, Director of the Ohio Department of Transportation,-/ individually and in his official capacity.

PATRICK McCRAY, Deputy Director, Administrative Affairs of the Ohio Department of Transportation, individually and in his official capacity.

-/ The Ohio Department of Transportation is not a party for purposes of this Petition or the appeal before the Sixth Circuit. The Agency was originally named a defendant pursuant to the Age Discrimination in Employment Act, 29 *United States Code* §615. Pursuant to a Rule 41(a) motion, Federal Rules of Civil Procedure, the age claim was voluntarily dismissed in the district court.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD E. RICE,

Petitioner

v.

OHIO DEPARTMENT OF
TRANSPORTATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Edward E. Rice, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on October 13, 1989.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported. The opinion is reprinted in the appendix.

JURISDICTION

This cause arose under 42 *United States Code* §1983 and §1985.-/ The United States District Court for the Southern District of Ohio had jurisdiction under 28 *United States Code* §1331, §1343. On January 22, 1986, the District Court granted the respondents' motion for summary judgment, and the petitioner appealed.

The Court of Appeals for the Sixth Circuit had jurisdiction of this cause under 28 *United States Code* §1291. On October 13, 1989, the Sixth Circuit affirmed the District Court's summary judgment order and held that the failure of the petitioner, a public employee, to receive a promotion because he did not contribute to the Republican Party is not unconstitutional. The Sixth Circuit essentially held that this Court's precedent only reached employment decisions tantamount to a discharge. Thus, the First and Fourteenth Amendments were not violated when employment or promotion was conditioned upon political belief or political affiliation.

The Sixth Circuit also held that it is constitutional for a public employer to retaliate against a public employee by denying him a promotion because he previously filed a reverse sex discrimination charge. The Sixth Circuit treated the charge as speech of a private rather than a public concern.

The Court has jurisdiction to review this case under 28 *United States Code* §1254.

-/ The petitioner does not raise §1985 as an issue before this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

42 *United States Code* §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The petitioner, Edward E. Rice, has been employed by the Ohio Department of Transportation (ODOT) since May 1, 1969. He is presently a Personnel Officer III in the District 8 office of the Department located in Lebanon, Ohio. He was initially employed as a Personnel Officer I.

In September 1976, the petitioner filed a charge of sex discrimination against the Department for their failure to upgrade him in favor of a less qualified, female employee. The discrimination charge was settled between the parties in exchange for a future promotion for petitioner to Personnel Officer III. In 1978, the petitioner was promoted to a Personnel Officer III position, a classified position.

During the period 1975 to 1982, the petitioner was requested by the deputy director of District 8, the chief supervisor in the office, to fill-in as an administrative assistant (the next higher-rated position and an unclassified position) on a temporary basis without receiving the higher pay. In August 1981, the permanently assigned administrative assistant became ill and obtained a leave of absence. The deputy director of District 8 appointed the petitioner to fill the administrative assistant position on a temporary basis, prepared the paperwork for him to do so, and sent it for approval to the director of the department, respondent Weir, in Columbus and the deputy director, respondent McCray. Three days later, respondents Weir and McCray ordered the district deputy director to rescind the appointment.

Petitioner "unofficially" performed the duties of an administrative assistant in any event without receiving the higher pay.

The incumbent administrative assistant never returned to work because of ill health and a vacancy was declared. After the petitioner made known his desire for the vacant job, the job was given to Andrew Siehl, son of the Republican County Chairman of Preble County, Ohio. The district deputy director objected to the appointment of Mr. Siehl because he was not qualified to perform the job duties and said the petitioner was more qualified.

In August 1982, Siehl left the position on a temporary basis to work on a political campaign. Petitioner, becoming aware of Siehl's leave of absence, telephoned respondent McCray and verbally informed him of his interest in the position. Thereafter, on September 5, 1982, a Mr. Fife was appointed to the position. Fife, a classified employee, had been a subordinate to the petitioner. According to the district deputy director, Fife was also less qualified than the petitioner for the position.

The district deputy director then informed the petitioner that the reason he did not receive the position was because he did not contribute to the Republican Party and because he had filed a reverse sex discrimination charge against the Departmen When questioned by the petitioner as to the reason he did not receive the promotion, respondent McCray point blank told the petitioner that the reason he did not get the position was because he had *failed to contribute to the Republican Party*. Petitioner had previously been told in 1978 by the administrative assistant, his immediate supervisor, that anyone expecting a promotion must contribute to the governor's campaign.

Coupled with the statements was the written policy of ODOT which set forth the political considerations for hiring Republicans. The policy required a preference for Republicans over Democrats for Ohio Department of

Transportation job positions, and in particular, Republicans who contributed to the Party were given a preference over all others, including Republicans who did not contribute to the Party. The written policy stated:

> "Every attempt will be made by the District to hire in accordance with the following priorities: (a) Republicans; (b) un-committed; (c) un-requested; (d) Democrats. In every instance the District will attempt to hire (when a choice exists) a Republican who has worked and contributed in preference to a 'single vote'." *(Exhibit J)*

This policy was extended to promotions by respondents Weir and McCray. The petitioner was told by respondent McCray that he would not be considered for the administrative assistant position because he did not contribute to the Republican Party.-/

-/The petitioner filed his lawsuit in the United States District Court on December 23, 1982, during the period when the Republican Administration was about to give up power to the Democratic Administration. Thereafter the petitioner was a recipient of several additional retaliatory actions taken against him, (besides the denial of the promotion) including decreasing his job responsibilities, threats of dismissal, moving him to a smaller office and requiring him to face the wall, and receipt from his supervisors of verbal harassment in front of other employees.

Officials of the Department (then under the Democratic Administration which took over on January 1, 1983, after petitioner filed this lawsuit) attempted to bribe co-workers to have them proffer false testimony that petitioner was selling "promotions and jobs" in order to discharge the petitioner. The co-workers were promised promotions if they would do so and if the co-workers changed their political allegiance from Republican to Democrat.

In 1983, the Democratic leadership applied the same partisan policy as the Republicans, except preference was given to Democrats. Thus, the petitioner found himself in a position where it was no longer Republican versus Republican, but Democrat versus Republican. The petitioner attempted to amend the complaint after the Democrats took charge, but the district court denied the amendment.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court of Appeals For The Sixth Circuit In This Case Is In Direct Conflict With The Decisions Of Other Circuit Courts of Appeal.

A. This Court Has Granted The Writ On An Identical Issue In *Rutan v Republican Party Of Illinois*

On October 3, 1989, this court granted the writ in *Rutan v. Republican Party of Illinois*, 58 L.W. 3185 (October 3, 1989). The questions presented before the court in *Rutan* are identical to questions 1 and 2 presented in this Writ regarding the promotion issue.

B. The Courts of Appeal Are Sharply Divided As To Whether Denial Of Employment Rights, i.e. Promotion, Due To Political Beliefs And Political Affiliation Violates First Amendment Rights.

In the *Rice* decision, the Sixth Circuit followed its July 25, 1989, decision in *Messer v. Curci*, 881 F2d 219 (6th Cir. 1989), (en banc) and held in *Rice* that:

> *Messer* draws a sharp distinction between politically motivated firings and other types of personnel decisions — failure to hire or rehire, e.g. — based on political considerations. As far as hiring decisions are concerned, we held, the 'allegation of political patronage . . . standing alone does not state a claim for violation of 42 *U.S.C.* §1983. *Messer v. Curci*, 881 F2d at 220.
>
> *Messer* is controlling here. We see no meaningful distinction, in the present context between a failure to promote and a failure to hire or rehire. Assuming Mr. Rice's allegations of political motivation are correct, the defendant's decision not to promote Mr. Rice was the product of precisely the sort of

> preference for political supporters in government employment that we found constitutionally permissible in *Messer*. (A-5,6)

The decisions in two other circuits, *Rutan v. Republican Party of Illinois*, 868 F2d 943, 951-954 (7th Cir. 1989), (en banc), and *Delong v. United States*, 621 F2d 618, 624 (4th Cir. 1980) follow the Sixth Circuit. These decisions conflict with *Bennis v. Gable*, 823 F2d 723 (3rd Cir. 1987), [Court held First Amendment's reach extended to disciplinary action, i.e. demotion and transfer] *Waters v. Chaffin*, 684 F2d 833 (11th Cir. 1982), [Court held disciplinary demotion and transfer protected by First Amendment] and *Lieberman v. Reisman*, 857 F2d 896, 900 (2nd Cir. 1988). [Court held First Amendment's reach extended to political retaliation, i.e. refusal to pay earned compensation and vacation time and because of political activities]. Thus, state public employers in the Fourth, Sixth, and Seventh Circuits may discriminate on the basis of political belief and political affiliation, but state public employers in the Second, Third, and Eleventh Circuits may not.

In *Rutan v. Republican Party of Illinois*, Judge Ripple dissented and presented the dilemma:

> In this bob-tailed en banc proceeding, the majority has filed essentially the same opinion that was filed by the majority in the original panel's consideration of this matter. *Rutan v. Republican Party of Illinois*, 848 F2d 1396 (7th Cir. 1988). I shall rely therefore on the separate opinion I filed when the case was before the panel. *Id.* at 1412. I note only that, with the Second Circuit's decision in *Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988), the division among the circuits appears to deepen. Apparently, government workers in Hartford, New York, Philadelphia, Pittsburgh, and Atlanta can expect protection when a local politician makes life

> uncomfortable because they do not knuckle under to his political will — even though politics has nothing to do with their jobs. In Chicago, and perhaps Richmond, the watchword is "politics as usual." 868 F.2d at 959.

This court must ultimately decide the correct legal standard for politically-motivated employment decisions by state public employers other than discharge, held to be illegal in *Branti v. Finkle*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1975).

II. The Sixth Circuit's Decision, Holding Constitutional Retaliatory Conduct By Public Officials Against A Public Employee Because He Filed An Individual Reverse Sex Discrimination Charge — A Matter Of Public Concern — Is In Direct Conflict With The Eighth Circuit.

The Sixth Circuit in *Rice v. Ohio Dept. of Transportation* held that the First Amendment does not convert a public employee's individual charge of reverse sex discrimination into a matter of "public concern" so as to be protected by the First Amendment against any retaliatory action. A conflict exists with the Eighth Circuit in *Greenwood v. Ross*, 778 F2d 448, 457 (8th Cir. 1985), which holds that the filing of a civil rights lawsuit and discrimination charge with the Equal Employment Opportunity Commission is per se regarded as activity protected by the First Amendment. The Sixth Circuit appears to also adopt a per se rule when it holds that an individual filing of charge of discrimination is a filing on a personal rather than a public concern. Judge Martin, who dissented in *Rice* stated,

> "However, I also dissapprove of the majority's summary dismissal of Rice's claims of discriminatory conduct by a governmental employer. Allegations of race or sex discrimination by a public employer, even if such allegations are made by only

> a single employee, may frequently implicate matters of public concern and may therefore fall within the protection of the First Amendment. See *Connick*, 461 U.S. at 149 n. 8; *Matulin v. Village of Lodi*, 862 F2d 609, 612-13 (6th Cir. 1988). Because Rice's employee grievance involved an allegation of reverse sex discrimination, I dissent from the majority's affirmance of the district court's summary dismissal of Rice's first amendment retaliation claim. The Supreme Court has suggested that allegations of discrimination by a public employer are "a matter inherently of public concern," *Connick*, 461 U.S. at 149 n. 8. (A-13).

The majority in *Rice* stated:

> The Supreme Court has never directly addressed the extent to which an employment grievance like the one filed by Mr. Rice constitutes speech on a matter of public concern. Lower courts have sometimes assumed, often without extensive discussion, that because illegal discrimination against public employees is a matter of public concern, any adverse employment decision resulting from a complaint about such discrimination necessarily violates the First Amendment. [citations omitted]. (A-7,8).

By categorizing all communications regarding an employee's own situation as matters of private rather than public concern, the Sixth Circuit deviated from the framework this Court has evolved in recent precedent. *Connick v. Myers*, 461 U.S. 138 (1983).

The Sixth Circuit erected a false dichotomy. Communications motivated by personal concern may well involve matters of public concern. Mr. Rice alleged reverse sex discrimination in 1976, during a period when the public debate was just beginning on reverse discrimination. *Regents*

of University of California v. Bakke, 438 U.S. 265 (1978). Rice's grievance transcended his personal situation and affected not only how the state engaged in affirmative action, but also affected deep constitutional principles regarding the treatment of individuals and groups in our society.

The most likely motivation for speech on matters of public concern by a public employee will be his or her self-interest. The focus, however, must be on the nature of the speech, not the motivation of the speaker.

In addition, Mr. Rice's charges coupled with the state officials' retaliatory conduct ipso facto created a chilling effect upon other state employees who seek to vindicate their federal and constitutional rights.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Sixth Circuit to review the questions presented by this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew J. Ruzicho, a member of the bar of this court and counsel for petitioner herein, hereby certifies that three copies of the Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit have been served by certified mail, postage-paid, upon, counsel for respondents, David A. Kopech, Esq., 17 South High Street, Suite 707, Columbus, Ohio 43215 this 9th day of November 1989.

ANDREW J. RUZICHO

In the
United States Court of Appeals
For The Sixth Circuit

OCTOBER TERM, 1989

No. 86-3312

EDWARD E. RICE,

Plaintiff-Appellant

v.

OHIO DEPARTMENT OF TRANSPORTATION; DAVID L. WEIR, DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION; AND PATRICK McCRAY, DEPUTY DIRECTOR, ADMINISTRATIVE AFFAIRS, OHIO DEPARTMENT OF TRANSPORATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

DECIDED AND FILED OCTOBER 13, 1989

Before: MARTIN and NELSON, *Circuit Judges*, and CONTIE, *Senior Circuit Judge*.

NELSON, *Circuit Judge*, delivered the opinion of the court in which CONTIE, *Senior Circuit Judge*, joined. MARTIN, *Circuit Judge*, (pp.12-14) delivered a separate opinion concurring in part and dissenting in part.

DAVID A. NELSON, *Circuit Judge*. This is a federal civil

rights action brought by an employee of the Ohio Department of Transportation who alleged that he was passed over for promotion on the basis of considerations that were illegal under the First and Fourteenth Amendments. One of these considerations, the plaintiff claimed, was his failure to engage in political activity on behalf of the party that was in power at the time he was denied promotion.

The district court entered summary judgment for the defendants. Our disposition of the ensuing appeal was deferred pending consideration by the full court of the issues presented in *Messer V. Curci*, 881 F.2d 219 (6th Cir. 1989) (en banc), a case similar to this in certain respects. The panel renewed its deliberations in the present case following issuance of the decision in *Curci*, and for the reasons explained below we now affirm the judgment of the district court.

I

The plaintiff, Edward E. Rice, has been an employee of the Ohio Department of Transportation since 1969. For some time before the present action was filed in December of 1982, Mr. Rice held the position of Personnel Officer III at the Department's District 8 office in Lebanon, Ohio. The position is a "classified" one under the Ohio civil service laws.

In September of 1976 Mr. Rice filed a reverse sex discrimination charge against the Department before the Ohio Civil Rights Commission. The charge was resolved amicably. In August of 1981 a departmental employee who was an Administrative Assistant IV took a leave of absence, creating a temporary vacancy. On August 24, 1981, Mr. Rice was notified that he was receiving a temporary promotion to fill the administrative assistant position, which was "unclassified." Three days later Mr. Rice's supervisor rescinded the temporary promotion on orders from his superiors.

In due course it developed that the previous administrative assistant would not return from his leave of absence. A permanent vacancy was declared, and Mr. Rice made known his interest in filling it. The job went instead to one Andrew Siehl, the son of the Republican county chairman of Preble County, Ohio. Andrew Siehl was 26 years old. Mr. Rice was approximately twice that age.

Mr. Siehl took a temporary leave of absence in August of 1982, and he was replaced by another young man, James Fife. Plaintiff Rice was allegedly told by his supervisor that he (Rice) had been passed over because of his earlier sex discrimination charge and because he had failed to give enough money to the Republican Party.

Mr. Rice thereupon brought suit against the Department, its director, and its deputy director, asserting claims under the Age Discrimination in Employment Act and under 42 *U.S.C.* § §1983 and 1985. The defendants moved for summary judgment. The district court denied the motion with respect to the age discrimination claim (the only claim asserted against the Department), but the court granted summary judgment for the director and deputy director on the other claims. The age discrimination claim was subsequently dismissed by stipulation, making this appeal possible.

II

We first address Mr. Rice's claims under 42 *U.S.C.* §1983. That statute provides, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Insofar as the director and deputy director were acting in their official capacities, it is now clear that they, like the state itself, were not "persons" within the meaning of §1983:

> "Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985). As such, it is no different from a suit against the State itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-166, 405 [sic] S.Ct. 3099, 3104-3105, 87 L.Ed.2d 114 (1985); *Monell* [*v. New York City Dept. of Social Services*, 436 U.S. 658,] 690, n. 55, 98 S.Ct. [2018,] 2035, n.55. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.
>
> We hold that neither a State nor its officials acting in their official capacities are 'persons' under §1983."

Will v. Michigan Dept. of State Police, _ U.S. _, _, 109 S.Ct. 2304, 2311-12 (1989) (footnote omitted).

Although the complaint filed by Mr. Rice alleges at one point that the individual defendants were acting both "in their official and personal capacities," the record does not suggest in any way that the defendants' actions were somehow unofficial. The capacity in which the individual defendants were in fact acting is what matters, not the capacity in which they were sued; congressional intent is not to be circumvented, *Will* says, "by a mere pleading device." But even if we were to assume that the defendants acted in a personal capacity --

and the district court made no finding on this point — we are persuaded, for reasons to which we now turn, that there could be no recovery here.

A

Mr. Rice contends that the defendants' consideration of political factors in deciding not to promote him violated his free speech rights under the First Amendment, as incorporated in the Fourteenth Amendment. At the time the district court rendered its decision, the law in this area was in a state of some uncertainty. Unable to find any Sixth Circuit authority directly on point, the district court analyzed a number of district court opinions, including *Messer v. Curci*, 610 F.Supp. 179 (E.D. Ky. 1985), and *Avery v. Jennings*, 604 F. Supp. 1356 (S.D. Ohio 1985). On the strength of those opinions, among others, the district court concluded that the First Amendment, as interpreted in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), prohibits only the firing of public employees for political reasons, and does not prohibit refusals to hire for political reasons.

Subsequent to the district court's decision, both *Avery* and *Messer* became the subject of opinions by this court. In *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), we said that "the first amendment prohibits official hiring policies based solely on political affiliation," and we interpreted *Elrod* and *Branti* as condemning, on constitutional grounds, "a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions." 786 F.2d at 234 and 237. Sitting *en banc*, however, we departed from *Avery* in *Messer v. Curci*, 881 F.2d 279 (6th Cir. 1989). *Messer* draws a sharp distinction between politically motivated firings and other types of personnel decisions — failure to hire or rehire, *e.g.* — based on political considerations. As far as hiring decisions are concerned, we held, the "allegation of political patronage . . .

standing alone, does not state a claim for violation of 42 *U.S.C.* §1983 . . . . " *Id.* at 220.

Messer is controlling here. We see no meaningful distinction, in the present context, between a failure to promote and a failure to hire or rehire. Assuming Mr. Rice's allegations of political motivation are correct, the defendants' decision not to promote Mr. Rice was the product of precisely the sort of "preference for political supporters in government employment" that we found constitutionally permissible in *Messer*. *Id.* at 223. Under *Messer*, the district court's decision to dismiss this claim was clearly correct.

B

Mr. Rice raises a second claim under §1983, based on the theory that the decision not to promote him was taken partly in retaliation for his filing of the sex discrimination claim in 1976. Such retaliation, Mr. Rice contends, is unconstitutional.

The district court rejected this contention in reliance on *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984). That case held that an action to vindicate rights secured by Title VII of the Civil Rights Act of 1984 must be brought under that statute, and not under §1983. Unlike the plaintiff in *Day*, Mr. Rice has not brought his §1983 retaliation claim to vindicate rights secured by Title VII; he seeks to vindicate rights he says are secured by the First Amendment to the Constitution. We pointed out in *Day* that a public employee "may sue . . . under both Title VII and §1983 when the §1983 violation rests on a claim of infringement of rights guaranteed by the Constitution." *Id.* at 1205 (citing *Grano v. Department of Development*, 637 F.2d 1073 (6th Cir. 1980)). *Day* is therefore not controlling in this case.

We are called upon here to decide whether the First Amendment itself, as made applicable to the states by the Fourteenth Amendment, prohibits the withholding of promotion in retaliation for the filing of an employment discrimination charge against a governmental employer.[1] It is beyond dispute that public employees may not "constitutionally be complelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interst." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); see also *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). The threshold question in such cases, as the Supreme Court has recently emphasized, is whether the speech involves a matter of "public concern." *Connick v. Meyers*, 461 U.S. 138, 146 (1983); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); see also *Brown v. City of Trenton*. 867 F.2d 318, 321 (6th Cir. 1989). If the speech does not involve a matter of public concern, it is "unnecessary for us to scrutinize" the employment decision. *Connick*, 461 U.S. at 138. Not every job-related grievance of a public employee is a matter of public concern. In *Connick*, for example, the issues raised by the plaintiff's circulation of a questionnaire among her co-workers were "mere extensions of [the plaintiff's] dispute over her transfer" to another position, not issues of broader interest to society at large. *Id.* at 148.

The Supreme Court has never directly addressed the extent to which an employment grievance like the one filed by Mr. Rice constitutes speech on a matter of public concern. Lower courts have sometimes assumed, often without extensive

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[1]For the first time on appeal, Mr. Rice suggests that the allegedly retaliatory failure to promote also violated his right to due process and his rights under the Equal Protection Clause. These provisions of the Fourteenth Amendment were not mentioned in Mr. Rice's complaint as a basis for the retaliation claim, and were not otherwise relied upon in the proceedings before the district court. We shall not consider them here.

discussion, that because illegal discrimination against public employees is a matter of public concern, any adverse employment decision resulting from a complaint about such discrimination necessarily violates the First Amendment. See *Greenwood v. Ross*, 778 F.2d 448, 456-57 (8th Cir. 1985); *Christensen v. Lawrence F. Quigley Memorial Hospital*, 656 F.Supp. 14, 19 (D.Mass. 1985); *Fuchilla v. Prockop*, 682 F.Supp. 247, 261-62 (D.N.J. 1987); *Brown v. Town of Allenstown*, 648 F.Supp. 831, 839 (D.N.H. 1986); *cf. Owens v. Rush*, 654 F.2d 1370, 1377-80 (10th Cir. 1981) (male employee fired for assisting wife with her discrimmination charge).

In *Yatvin v. Madision Metropolitan School District*, 840 F.2d 412 (7th Cir. 1989), which, like this, was a failure-to-promote case, the Court of Appeals for the Seventh Circuit took a somewhat different approach. Although it may be "natural for lawyers to suppose that every legal pleading, however humble, comes trailing clouds of First Amendment glory," the Seventh Circuit said, this quaintly Wordsworthian supposition is simply untenable. *Id.* at 420. Some litigation, such as litigation to eliminate school segregation, clearly constitutes speech on a matter of public concern, see *NAACP v. Button*, 371 U.S. 415 (1963), but the legal action commenced by the plaintiff in *Yatvin* had been instituted "to advance her career, not promote a cause." *Yatvin*, 840 F.2d at 419. The *Yatvin* plaintiff could not invoke the protection accorded "public concern" claims, because she had made no attempt to distinguish her case from the "run-of-the-mine single-plaintiff discrimination case." *Id.* at 420.

In the instant case, similarly, plaintiff Rice has made no attempt to distinguish his 1976 reverse discrimination charge from the run-of-the-mine single-plaintiff discrimination case. Unlike the plaintiff in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), who was simply "speak[ing] out as a citizen on a matter of general concern" in protesting to her employer about what she saw as its racially discriminatory policies, see *Connick*, 461 U.S. at 149 n. 8,

Mr. Rice was not "speak[ing] out as a citizen" when he filed his reverse discrimination charge. Mrs. Givhan's protests to her employer, the Supreme Court thought it important to note, were "not tied to a personal employment dispute . . . " *Connick*, 461 U.S. at 149 n. 8. The personal reverse discrimination charge filed by Mr. Rice, in contrast, was part and parcel of Mr. Rice's own "personal employment dispute." If the First Amendment does not convert every public employee grievance into a matter of public concern, we have been given no reason to suppose that a retaliatory failure to promote Mr. Rice would be unconstitutional.

Messer is a stronger case, in this respect, than the case presented by Mr. Rice. If a state may constitutionally refuse to hire an employee because of the employee's political philosophy and associations, it is difficult to see why a state may not consitutionally refuse to promote an employee for filing an individual grievance on a matter that does not implicate the employee's political philosophy and associations.

This court has previously held that a public employee's public discussion of charges that her government employer discriminated against women constituted speech on a matter of public concern. *Matulin v. Village of Lodi*, 862 F.2d 609, 612-13 (6th Cir. 1988). We stressed in *Matulin* that the plaintiff was merely responding to media inquiries about "an existing controversy." *Id.* at 613. In the present case, by contrast, the record does not reveal the existence of a public controversy concerning allegations of reverse sex discrimination at the Ohio Department of Transportation.

The plaintiff has called our attention to a number of cases decided under statutes other than § §1983 and 1985, but those cases are not in point. The question presented by Mr. Rice's §1983 claim is whether the defendants deprived Mr. Rice of a right secured by the United States Constitution. It does not detract from the seriousness of Mr. Rice's

retaliation claim to say, as we are constrained to say, that it simply is not a claim arising under the First Amendment.

III

Mr. Rice relies, finally, upon 42 *U.S.C.* §1985(3), which provides, in pertinent part, as follows:

> "If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the parties so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

This statute requires a showing of "some racial, or perhaps other class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); see also *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1963). Although the Supreme Court has stated that "it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause," *Scott*, 463 U.S. at 836, there is a line of Sixth Circuit cases holding that a group of persons holding similar political views

can be a "class of persons" for purposes of §1985(3). See *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987); *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973) ("clearly defined classes, such as supporters of a political candidate," come within §1985(3)); *Glasson v. City of Louisville*, 518 F.2d 899, 911-12 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

Conklin, *Cameron*, and *Glasson* suggest that all registered Republicans would constitute a clearly defined "class of persons" for purposes of §1985(3). Mr. Rice, however, does not claim he was discriminated against for not being a registered Republican; Mr. Rice is a Republican, as it happens, and insofar as § 1985 is concerned his claim is that he was conspired against simply "because of lack of political activity in the Republican Party . . . "

The degree of political activity engaged in by members of the same political party is too uncertain a standard, in our view, for delineating "clearly defined classes" of the sort §1985 was designed to protect. Noting that "there is no indication that plaintiff is a member of any class which has historically been entitled to Fourteenth Amendment protection," the district court concluded that Mr. Rice was not a member of a "discrete group" against whom the defendants' alleged conspiratorial animus was directed. We agree.

The judgement of the district court is **AFFIRMED**.

BOYCE F. MARTIN, JR., *Circuit Judge*, concurring in part and dissenting in part. I reluctantly concur in the majority's holding that, under the authority of *Messer v. Curci*, _ F.2d _ (6th Cir. 1989) (en banc), the district court did not err in its dismissal on summary judgment of Rice's §1983 claim for failure to promote. Although I disagreed with the decision in *Messer* for the reasons stated in my dissenting opinion in that case, *Messer* is controlling here and mandates the affirmance of the district court's judgment.[1]

However, I dissent from the majority's holding that the district court correctly dismissed Rice's §1983 claim that the defendants' decision not to promote him, which was allegedly taken in retaliation for his filing a reverse sex discrimination charge, violated the first amendment. The Supreme Court has not yet explicitly decided whether the first amendment prohibits the withholding of promotion in retaliation for the filing of an employment discrimination charge against a governmental employer. In several previous cases, the Court has applied a general balancing test to determine whether a public employee's speech requires constitutional protection. *Rankin v. McPherson*, 483 U.S. 378 (1987). The threshold question in applying this balancing test is whether the public employee's speech may be characterized as constituting speech on a matter of "public concern," as determined by the content, form and context of the speech. *Connick v. Myers*, 461 U.S. 138, 146-48 (1983). Thus, the question raised by this appeal is whether Rice's speech, as evidenced by his employment discrimination charge against the defendants, constitutes speech on a matter of "public concern."

I cannot agree with the majority's decision that Rice's retaliation claim does not constitute speech on a matter of public concern and therefore is not a claim arising under the first amendment. Admittedly, not every employment-

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[1]I also concur without comment on the majority's affirmance of the district court's dismissal of Rice's claim under Section 1985(3).

related grievance of a public employee raises a matter of public concern under the first amendment; I consequently disagree with the Eighth Circuit's broad rule that the filing of a civil rights lawsuit and discrimination charge with the Equal Employment Opportunity Commission are per se regarded as activities protected by the first amendment. *Greenwood v. Ross*, 778 F.2d 448, 456-57 (8th Cir. 1985). However, I also disapprove of the majority's summary dismissal of Rice's claims of discriminatory conduct by a governmental employer. Allegations of race or sex discrimination by a public employer, even if such allegations are made by only a single employee, may frequently implicate matters of public concern and may therefore fall within the protection of the first amendment. *See Connick*, 461 U.S. at 149 n.8; *Matulin v. Village of Lodi*, 862 F.2d 609, 612-13 (6th Cir. 1988). Because Rice's employee grievance involved an allegation of reverse sex discrimination, I dissent from the majority's affirmance of the district court's summary dismissal of Rice's first amendment retaliation claim.

The Supreme Court has suggested that allegations of discrimination by a public employer are "a matter inherently of public concern." *Connick*, 461 U.S. at 149 n.8. While the granting of summary judgment in this case does not substantially reduce access to the federal courts, it does begin to erode this opportunity for plaintiffs such as Rice.[2]

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[2]Even in *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988), the case primarily relied upon by the majority, the district court did not summarily dismiss the plaintiff's first amendment retaliation claim. The dismissal of first amendment claims on summary judgment may effectively preclude plaintiffs, such as Rice, from establishing a viable first amendment claim by preventing them, as the Seventh Circuit required in *Yatvin*, from distinguishing their cases from the "run-of-the-mill single-plaintiff discrimination case." *Yatvin*, 840 F.2d at 420.

Accordingly, I dissent from the majority's decision to uphold the district court's grant of summary judgment to defendants on Rice's first amendment claim.

Supreme Court, U.S.
FILED
DEC 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-761

In the Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD E. RICE,

Petitioner

v.

OHIO DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

SUPPLEMENTAL APPENDIX

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IN THE
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SUPPLEMENTAL APPENDIX

The Petitioner, Edward E. Rice, files his Supplemental Appendix pursuant to Rule 21, Supreme Court Rules, and includes the Memorandum and Order of the United States District Court, Southern District of Ohio, Eastern Division, rendered by Judge Holschuh.

OPINION BELOW

The Memorandum and Order of the United States District Court, Southern District of Ohio, Eastern Division is set forth herein-[1], B-1, et. seq.

[1] Note that §§C(1)(2) of the Memorandum and Order are the only portions relevant to the issues before this Court.
(see pp. B-15 to B-22)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD RICE,	:	
	:	January 22, 1986
Plaintiff,	:	
	:	Case C-2-82-1700
vs.	:	
	:	
OHIO DEPARTMENT	:	
OF TRANSPORTATION,	:	
ET AL.,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Plaintiff brings this action alleging discrimination on the basis of age, political activity, and in retaliation for having filed a previous charge of discrimination with the Ohio Civil Rights Commission (OCRC). The jurisdiction of this Court has been invoked pursuant to 29 U.S.C. §§216, 633a(c) and 28 U.S.C. §§1331(a), 1343(3). This matter is before the Court on defendants' motion for summary judgment and plaintiff's motion for leave to file a supplemental memorandum.

I. FACTS OF THE CASE

Plaintiff is a white male who was fifty-two years of age when this complaint was filed. He has been an employee of the Ohio Department of Transportation (ODOT) since May of 1969. At all times relevant to the complaint plaintiff has been in the position of Personnel Officer which is a classified position. Defendant ODOT is an agency of the State of Ohio. Defendant Weir was Director and defendant McCray was Deputy Director, Administrative Affairs, of ODOT at the time of the filing of the complaint.

On or about September 27, 1976 plaintiff filed a charge with OCRC alleging that defendant ODOT had discriminated against him on the basis of sex. The charge was resolved between the parties.

Subsequently, plaintiff alleges that in August, 1981 he requested a temporary work level increase to the position of Administrative Assistant 4. This position had been temporarily vacated when the then Administrative Assistant took a medical leave of absence. On August 24, 1981 Deputy Director Brayshaw issued an inter-office communication assigning plaintiff to this position. Three days later, however, the communication was rescinded and Deputy Director Brayshaw stated that he (Brayshaw) would handle the Administrative Assistant duties. The deposition of Mr. Brayshaw, however, indicates that plaintiff continued to perform some of these duties. Plaintiff states that he was advised that he could not be placed

in the position because he was a classified employee and the Administrative Assistant was an unclassified position. The Administrative Assistant position became permanently vacated and, on October 18, 1981 Andrew F. Siehl, age twenty-six and the son of the Republican County Chairman of Preble County, Ohio, was appointed to the position.

Mr. Siehl took a temporary leave of absence from September, 1982 through November 22, 1982. Plaintiff claims that he again applied for the temporary position, however, James G. Fife, age twenty-eight and an Administrative Assistant 2, was temporarily promoted to the position. Mr. Fife was a classified employee.

On September 20, 1982 plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging discrimination on the basis of age in regard to the August 1981 and September 1982 incidents. On September 24, 1982 plaintiff filed a charge with OCRC regarding the same incidents alleging that defendant ODOT refused to place him in the position in retaliation for plaintiff's previous charge of discrimination. On December 23, 1982 plaintiff filed the present action.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interroga-

> tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The purpose of the summary judgment procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. Lashlee v. Sumner, 570 F.2d 107, 111 (6th Cir. 1978); Felix v. Young, 536 F.2d 1126, 1130 (6th Cir. 1976); United States v. Articles of Device, Consisting of Three Devices . . . "Diapulse", 527 F.2d 1008, 1011 (6th Cir. 1976); Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962). Therefore, summary judgment should be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, [and where] no genuine issue remains for trial, [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944). Accord Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962); Associated Press v. United States, 326 U.S. 1, 6 (1945); Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965).

"[T]he question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case . . ." First National Bank v. Cities Service Co., 391 U.S. 253, 259 (1968). The moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it

lodged will be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted). Accord Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472 (1962); Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979); Rodgers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965). Similarly, "inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Accord Watkins v. Northwestern Ohio Tractor Pullers Assoc., Inc., 630 F.2d 1155, 1158 (6th Cir. 1980); United States v. Articles of Device Consisting of Three Devices . . . "Diapulse", 527 F.2d 1008, 1011 (6th Cir. 1976); Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965). "Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962). Accord Smith v. Hudson, 600 F. 2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979).

The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472, (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944). "[T]he issue of material fact required by Rule 56(c) . . . to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that

is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First National Bank v. Cities Service Co., 391 U.S. 253, 288-9 (1968).

The Supreme Court has stated that "Rule 56 should be cautiously invoked." Associated Press v. United States, 326 U.S. 1, 6 (1945). Similarly, the Sixth Circuit has held: "Although summary judgment is a useful and often efficient device for deciding cases, it must be used only with extreme caution for it operates to deny a litigant his day in court." Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979). Accord Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965) ("[I]t is further clear that summary judgment should be granted with caution . . .").

In some areas of law, summary judgment is especially disfavored. Cases involving motive or intent are ordinarily not susceptible to summary adjudication. Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127 (6th Cir. 1981); Smith v. Hudson, 600 F.2d 60, 66 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979). Similarly, summary judgment is usually not suitable in cases dealing with antitrust, Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 500 (1969); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Ware v. Trailer Mart Inc., 623 F.2d 1150, 1154 (6th Cir. 1980), or negligence, McTavish v. Chesapeake and O.R.R., 485 F.2d 510, 513 (6th Cir. 1973); Rogers

v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965). In addition, unusually complex cases or those in which the credibility of witnesses is in dispute are only rarely resolved through summary judgment. For examples of unusually complex cases, see In Re Atlas Concrete Pipe, Inc., 668 F.2d 905, 909 (6th Cir. 1982); United States v. Lowell, 557 F.2d 70, 72 (6th Cir. 1977); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193, 1196 (6th Cir. 1974). For examples of cases involving the credibility of witnesses, see In Re Atlas Concrete Pipe, Inc., 668 F.2d 905, 909 (6th Cir. 1982); Willetts v. Ford Motor Co., 583 F.2d 852, 855 (6th Cir. 1978).

Additionally, Rule 56(e) of the Federal Rules of Civil Procedure provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Under Rule 56(e), "a party cannot rest on the allegations contained in his complaint in opposition to a properly supported motion for summary judgment against

him." First National Bank v. Cities Service Co., 391 U.S. 253, 259 (1968) (footnote omitted). The Sixth Circuit has held that

> where a moving party supports his motion for summary judgment by affidavit or other appropriate means, which are uncontroverted, a trial court is fully justified, within the purview of Rule 56 of the Federal Rules of Civil Procedure in granting relief thereon.

Williams v. Baltimore & O.R.R., 303 F.2d 323, 324 (6th Cir. 1962). Accord R.E. Cruise, Inc. v. Bruggeman, 508 F.2d 415, 416 (6th Cir. 1975); Daily Press, Inc. v. United Press International, 412 F.2d 126, 134 (6th Cir.), cert. denied, 396 U.S. 990 (1969).

The uncontroverted facts, however, must conclusively negate the existence of a genuine issue of material fact and establish the moving party's entitlement to judgment. If evidence in support of a motion for summary judgment does not establish a lack of a genuine issue of material fact and conclusively support the moving party's entitlement to judgment, summary judgment is not proper even if no opposing material is present; "unexplained gaps" in material submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes v. S. H. Kress Co., 398 U.S. 144, 157-60 (1970); Smith v. Hudson, 600 F.2d 60, 65 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979); Fitzke v. Shappell, 468 F.2pd 1072, 1077-8 (6th Cir. 1972).

III. LEGAL ANALYSIS

A. FAILURE TO TIMELY FILE

Defendants have raised two arguments in support of their position that plaintiff's claim that he was discriminated against in August 1981 is time-barred. First, defendants argue that plaintiff has failed to comply with 29 U.S.C. §626(d). Second, defendants argue that plaintiff has failed to comply with Ohio Revised Code §4112.05. The Court finds these arguments unpersuasive and summary judgment is therefore DENIED on this issue.

1. 29 U.S.C. §626(d)

29 U.S.C. §626(d) requires that a charge of age discrimination be filed within 180 days or, in the case of a deferral state such as Ohio, 300 days of the unlawful practice. See Hall v. Ledex, Inc., 669 F.2d 397 (6th Cir. 1983).

Defendants argue that the alleged unlawful practice occurred on August 27, 1981 when plaintiff received notice that he was not to handle the duties of the Administrative Assistant. As plaintiff's EEOC charge was not filed until September 20, 1982, it is defendants' position that it was beyond the 300 day requirement and should therefore be barred. Plaintiff contends that he was not aware of the pretext until the subsequent 1982 incident when a classified employee was placed in the unclassified position. As such, he argues the statute should be tolled. Plaintiff further argues that the 1982 incident was a con-

tinuing violation of the 1981 incident.

A review of the case law in this area reflects varying responses by the courts when at least one event has been the subject of a timely charge and the court must decide whether the employer can also be held liable for previous events falling outside of the time requirements. See Elliott v. Sperry Rand Corp., 79 F.R.D. 580 (D. Minn. 1978) and cases cited therein. As stated by the court in Elliott:

> [I]t seems that the courts are not really concerned with continuity so much as they are with practically assessing the employment situation from the lay person's viewpoint. The focus is on what event, in fairness and logic should have alerted the average lay person to act to protect his rights, or when he should have perceived that discrimination was occurring.

Elliott, 79 F.R.D. at 585.

Defendants argue that as a Personnel Officer, plaintiff should have known of the personnel policies and laws governing hiring and promotion. Plaintiff argues, however, that he did not become aware of the pretext until a younger classified employee was placed in the Administrative Assistant position. Although it is clear from plaintiff's deposition that he may have had suspicions as to why he did not get the job, the evidence is insufficient for this Court to determine as a matter of law that plaintiff's cause of action for age discrimination arose in August of 1981. See, e.g., Meyer v. Riegel Products Corp., 720 F.2d 303, 308-09 (3d Cir. 1983), cert. dismissed, 104 S. Ct. 2144.

(1984) General Adjustment Bureau, 616 F.2d 785, 790 (5th Cir. 1980).

2. Ohio Revised Code §4112.05

Ohio Revised Code §4112.05 requires that a charge of discrimination be filed with OCRC within six months of the alleged discriminatory act. Defendants argue that plaintiff's failure to so file until September of 1982 should therefore bar plaintiff's 1981 claims.

The six month state statute of limitations is not a bar to plaintiff's claim. 29 U.S.C. §633(b) only requires that state proceedings be commenced, not that they be commenced within the time allotted by state law. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 759 (1979). It is unclear from the record, however, whether plaintiff ever properly commenced state proceedings. The charge which plaintiff filed with the OCRC was based upon retaliation. It does not put the OCRC on notice of any claims of discrimination based upon age and therefore cannot be said to comply with 29 U.S.C. §626(d). The purpose of that section is to give state agencies an opportunity, albeit a limited one, in which to settle the grievances of an ADEA claimant. Oscar Mayer, 441 U.S. at 761.

Notwithstanding this fact, it would still be inappropriate for the Court to grant summary judgment to defendants on this issue. Plaintiff did file a charge of age discrimination with the EEOC on September 20, 1982. Ohio is a deferral state and when a party files a charge

solely with the EEOC, the EEOC will refer the charge to the state agency and hold the charge in abeyance until the sixty days have expired. Love v. Pullman Co., 404 U.S. 522 (1972); Leis v. Opportunity Consultants, 441 F. Supp. 1314, 1316 (S.D. Ohio 1977). There is no evidence before this Court to establish whether the EEOC followed this procedure. Failure of the EEOC to do so would not require dismissal of plaintiff's claim, see, e.g., Toombs v. Greer-Smyrna, Inc., 529 F.Supp. 497, 501 (M.D. Tenn. 1982), aff'd, 709 F. 2d 1509 (6th Cir. 1983); Mitchell v. Mid-Continent Spring Co., 466 F.2d 24 (6th Cir. 1972), cert. denied, 410 U.S. 928 (1973), but would require this Court to hold the case in abeyance until the charge had been properly deferred and the sixty day period had expired. Oscar Mayer, 441 U.S. at 764-65; Mitchell, 466 F.2d at 26-27.

B. PLAINTIFF'S PRIMA FACIE CASE OF AGE DISCRIMINATION

The Sixth Circuit has repeatedly rejected strict adherence to McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) criteria in cases arising under the ADEA. LaGrant v. Gulf & Western Mfg. Co., 748 F.2d 1087, 1090 (6th Cir. 1984); Rose v. National Cash Register Corp., 703 F.2d 225, 227 (6th Cir.), cert. denied, 104 S. Ct. 352 (1983); Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1179 (6th Cir. 1983); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70

(6th Cir. 1982); Schadi v. Reynolds Chemical, 636 F.2d 1116, 1118 (6th Cir. 1980) (per curiam); Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1978). Plaintiff establishes a prima facie case under the ADEA when he presents evidence which "when viewed in the light most favorable to the plaintiff would permit a reasonable jury to find that" he was discharged because of his age. Rose, 703 F.2d at 337.

Although the plaintiff bears the ultimate burden of showing that age was a determining factor, Laugesen, 510 F.2d at 317, it is the defendant at the summary judgment stage of the proceedings who has "the burden of showing conclusively that there exists no genuine issue of material fact." Smith v. Hudson, 600 F.2d 60, 63 (6th Cir. 1979). The evidence must be read together with all inferences to be drawn therefrom in the light most favorable to plaintiff. Id. Although questions of motive or intent are normally not suited to disposition on summary judgment, Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127 (6th Cir. 1981), cert denied, 456 U.S. 991 (1982), neither may the mere conclusory claim of age discrimination insulate plaintiff from summary judgment or establish plaintiff's prima facie case. Locke v. Commercial Union Insurance Co., 676 F.2d 205, 206 (6th Cir. 1982). The Court may grant the motion "if it determines that no evidence has been presented indicating that a discriminatory purpose was a motivating factor." Kendall v. The Hoover Co., 751 F.2d 171, 173 (6th Cir. 1984).

In regard to the 1981 incident, plaintiff has stated that he was in the protected age group, he was qualified for the position of Administrative Assistant, his supervisor was aware of his interest in the position, he was advised by interoffice communication that he would fulfill the duties of the position, this communication was rescinded three days later, and Mr. Siehl, age 26, was then placed in the position. Plaintiff has also stated that he was advised that he could not have the position because a classified employee could not be placed in an unclassified position but that this reason was, in fact, a pretext. No issue has been raised as to plaintiff's age or qualifications. Although defendants have argued that the position was unclassified and therefore there was no requirement to seek applicants for the position, neither may defendants use age as a criteria in their decision making process.

In regard to the 1982 incident, construing the complaint most favorably to the plaintiff, he argues that he again applied for the position and that it was given to Mr. Fife, age twenty-eight, who, like plaintiff, was a classified employee. Although defendant states that plaintiff did not apply until after the position had already been filled, an issue still has been raised as to whether age was a factor in the decision not to choose plaintiff for the position.

Accordingly, in that genuine issues of material fact exist as to plaintiff's age discrimination claim, summary judgment on this issue is inappropriate.

C. DISCRIMINATION ON THE BASIS OF POLITICAL ACTIVITY UNDER 42 U.S.C. §§1983, 1985 AND 1988

1. 42 U.S.C. §1983 — Political Activity

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The required elements to state a section 1983 claim were set out by the Supreme Court in Gomez v. Toledo, 446 U.S. 635, 640 (1980):

> By the plain terms of §1983, two – and only two – allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

The first inquiry, therefore, is whether plaintiff has been deprived of a right secured by the Constitution and laws of the United States. See Maine v. Thiboutot, 448 U.S.

1, 7 (1980); Baker v. McCollan, 443 137, 140 (1979).

Plaintiff alleges that defendants intentionally discriminated against him by falling and refusing to promote him to an unclassified position on the basis of his lack of political activity. He argues that although he is a Republican, and the defendants are Republicans, he was disfavored for the promotion because he did not contribute to the Republican Party.

As an initial matter, it must be decided whether Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980), the two Supreme Court decisions which have dealt with the patronage system, are applicable to the present controversy. The limited plurality decision in Elrod was that a nonpolicymaking, nonconfidential government employee could not be discharged or threatened with discharge from a job he or she was satisfactorily performing upon the sole ground of political beliefs. Elrod, 427 U.S. at 375 (Stewart, J., concurring). In Branti the Court held that political affiliation could be a factor in a discharge only where the affiliation was an appropriate requirement for the effective performance of the office. Branti, 445 U.S. at 517-18. The decision, as in Elrod, was limited to discharges, id. at 513, fn. 7, and the majority of lower courts have refused to expand it to include other employment decisions. See, e.g., Avery v. Jennings, 604 F. Supp. 1356, 1362 (S.D. Ohio 1985) (refusal to rehire); Messer v. Curci, 610 F. Supp. 179, 183 (E.D. Ky. 1985) (refusal to hire); Horn v. Kean, 593 F. Supp. 1298, 1301

(D.N.J. 1984) (protection not to be expanded beyond public employees); Note, First Amendment Limitations on Patronage Employment Practices, 49 U. Chi. L. Rev. 181 (1982). Even those courts which have expanded Elrod and Branti have done so in a very narrow fashion. See, e.g., Delong v. United States, 621 F.2d 618, 623 (4th Cir. 1980) (applied where transfer amounted to "substantial equivalent of dismissal"); Auriemma v. City of Chicago, 601 F. Supp. 1080, 1086 (N.D. Ill. 1984) (applied to demotion from a high-ranking position, coupled with a pay cut). This Court is in agreement with the courts of this circuit that Elrod and Branti represent "a very narrow subclass... of cases involving discharge from public employment as a result of the exercise of first amendment rights." Avery, 604 F. Supp. at 1362.

It is more appropriate, therefore, to consider plaintiff's claim under a traditional first amendment analysis as set out in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). In Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439, 442-43 (6th Cir. 1981), cert. denied, 456 U.S. 910 (1982) the Sixth Circuit set forth the Mt. Healthy criteria as follows:

1. whether plaintiff's conduct deserves constitutional protection;

2. if so, whether the protected conduct was a "substantial factor" or a "motivating factor" in the employer's decision;

3. if so, whether the complained of action would have taken place absent the protected conduct.

Consideration of the first step requires a clear understanding of the precise issue which is before this Court. Accepting plaintiff's allegations as true, he states that the Republican Party has a policy of preferring contributing Republicans over noncontributing Republicans in hiring decisions. The document which plaintiff has attached to his memoranda provides, "In every instance the District will attempt to hire (when a choice exists) a Republican who has worked and contributed in preference to a 'single' vote." (Exhibit J to plaintiff's memorandum in opposition). Plaintiff states that he did not contribute to the party. Plaintiff is a classified employee and therefore part of the civil service system. The position in question was that of Administrative Assistant which is an unclassified position. Even taking as true plaintiff's statement that defendants knew of his interest in the position, it is also undisputed that no applications were taken and that a person in an unclassified position serves at the discretion of the Director. O.R.C. §§121.11, 124.11(A).

The issue before this Court, therefore, is whether a classified employee's claim that he did not receive a promotion into an unclassified position because of his "nonconduct," i.e., not contributing to his own political party, should be considered expressive conduct deserving of first amendment protection. The issue is not one of

right of association in that plaintiff and defendants are of the same political persuasion. In short, plaintiff, whose freedom of association and freedom of speech have not been abridged by defendants, seeks to have the Court compare the amount of contributions of money or work given by different persons to the same political party and to find a constitutional deprivation of employment opportunities based upon a disparity in those contributions. It is the opinion of this Court that to find in plaintiff's favor would be to overly extend the first amendment and "would involve the federal courts in a myriad of personnel decisions at state and local level[s] that would contravene the spirit of the Tenth Amendment." Messer, 610 F. Supp. at 184.

The primary concern of the first amendment is the full protection of speech upon issues of public concern. Connick v. Myers, 461 U.S. 138, 154 (1983). It has also long been recognized that speech may be nonverbal. Stromberg v. California, 283 U.S. 359 (1931) (unconstitutional to prohibit displaying red flag as sign of opposition to organized government); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (Jehovah Witness children cannot be compelled to salute flat); Brown v. Louisiana, 383 U.S. 131 (1966) (right to have peaceful sit-in at segregated public library); United States v. O'Brien, 391 U.S. 367 (1968) (burning draft card as having communicative element sufficient to bring first amendment into play). An important aspect of symbolic speech is the

intent to express an idea. O'Brien, 391 U.S. at 376. In each of the above-cited cases the actions taken were sufficiently definitive that the Court could presume an intent to communicate. In the present case, however, the mere fact that plaintiff did not make a contribution to his own political party conveys no such message. As compared to refusing to salute a flag, a failure to contribute could just as easily be due to lack of funds or forgetfulness as it could be an expression of public concern. Nor has plaintiff ever asserted that he intended his noncontribution to act as a statement or that he was attempting to express an opinion. This Court is unwilling to find that his non-action reflects an intent to communicate and should therefore be considered expressive conduct within the ambit of the first amendment.

Additionally, this Court must keep in mind "the practical realities involved in the administration of a government office." Connick, 461 U.S. at 154. Government offices could not function if every employment decision became a constitutional matter. Id. at 143. In Landrum v. Eastern Kentucky University, 578 F. Supp. 241, 247 (E.D. Ky. 1984) the court recognized that "the First Amendment in the employment context is now to be more narrowly interpreted to give greater scope to the legitimate rights of governmental entities as employers." This same concern was expressed by the court in Messer when it refused to expand Elrod to encompass hiring procedures. "[A]pplying the Elrod decision to hiring would be likely

to involve local government officials in numerous lengthy trials concerning the merits of disappointed job seekers. This would impose burdens on local government that were unacceptable to the majority of the Justices in Elrod." Messer, 610 F. Supp. at 183. The same reasoning applied with equal — if not greater — force in cases involving disappointed promotion seekers.

Plaintiff having failed to meet the first step of the Hildebrand analysis, his claim of discrimination on the basis that he did not financially support his own political party must be dismissed.

2. 42 U.S.C. §1983 — Retaliation

Plaintiff further argues that he was denied the promotion because he had previously filed a civil rights charge. He argues that he is therefore entitled to bring a claim of retaliation under 42 U.S.C. §1983. This argument, however, has been considered and rejected by the Sixth Circuit in a case with very similar facts.

In Day v. Wayne County Board of Auditors, 749 F.2d 1199 (6th Cir. 1984), plaintiff brought suit under Title VII, 42 U.S.C. §1981, and 42 U.S.C. §1983. He claimed that he was denied a promotion in retaliation for filing discrimination charges. In looking to the legislative history of the 1972 amendments which brought federal, state and local employees within the protection of VII, the court determined that Congress did not intend to preclude these employees from bringing suit under section 1983 for

"constitutional violations or for violation of statutes which protected such employees before the enactment of the 1972 amendments." Id. at 1204. As an example, the court pointed to Grano v. Department of Development, City of Columbus, 637 F.2d 1073 (6th Cir. 1980) where plaintiff was permitted to proceed under Title VII and section 1983 on her claim that defendant failed to promote her on the basis of sex. In Day, however, plaintiff's sole claim was based upon retaliation, which derives solely from Title VII. The Court therefore held that when the sole basis of a plaintiff's claim is retaliation, it cannot be the basis for a section 1983 claim. Id. at 1205.

For the foregoing reasons, it is the opinion of this Court that plaintiff has failed to state a claim upon which relief may be granted under 42 U.S.C. §1983 and this Court must therefore be DISMISSED.

3. 42 U.S.C. §1985

Plaintiff also alleges a conspiracy to deprive him of his constitutional rights under 42 U.S.C. §1985. Although plaintiff has not cited the specific portion of section 1985 which has been violated, it must be presumed from the facts that 42 U.S.C. §1985(3) is being invoked. That section makes it a federal tort for two or more persons to "conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal

protection of the laws, or of equal privileges and immunities under the laws . . ."

In considering the elements of a cause of action under section 1985(3), the Supreme Court has held that a plaintiff alleging a violation of that provision must establish some racial or otherwise "class-based, invidiously discriminatory animus" behind the conspirators' action. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). In a detailed analysis of the Griffin requirement, the Sixth Circuit Court of Appeals has held that only members of classes which are traditionally entitled to protection under the Equal Protection Clause of the Fourteenth Amendment are proper plaintiffs of actionable claims under section 1985. These classes include "discrete and insular minorities" and individuals who join together for the purpose of asserting fundamental rights. Browder v. Tipton, 630 F.2d 1149 (6th Cir. 1980). The class must be a discrete group which suffers "the sort of prejudice 'which tends . . . to curtail the operation of those political processes ordinarily to be relied upon to protect minorities' in our society." Id. at 1153 (citations omitted). The essential allegation in a section 1985 action is that defendants conspired against plaintiff because plaintiff is a member of a class which is defined by its assertion of a fundamental right. In Re Jackson Lockdown/MCO Cases, 568 F. Supp. 869, 882 (E.D. Mich. 1983). The statute does not reach situations where the discrimination is sparked by personal animosity because of individual conduct in

exercising a constitutional right, rather it applies only when the animus is sparked by a peculiar and unique manner of exercising a fundamental right. Browder v. Tipton, 630 F.2d at 1154. The distinction between protected and unprotected classes is "rooted somewhere in traditional equal protection analysis." Id. at 1152.

In regard to plaintiff's political activity claim, there is no indication that plaintiff is a member of any class which has historically been entitled to Fourteenth Amendment protection. The alleged denial of plaintiff's rights under the equal protection clause was not based upon his membership in some racial, religious, or political group. Plaintiff has not alleged that he is a member of a group exercising a fundamental right in some unique or peculiar fashion. Plaintiff's sole claim is that his own political party preferred to appoint a contributing Republican over a noncontributing Republican into an unclassified position. This is insufficient to state a cause of action under section 1985(3). Accord, Sellers v. Local 1598, 600 F. Supp. 1205, 1212 (E.D. Pa. 1984) ("Section 1985(3) was not meant to regulate combat between political parties and among the factions of which parties are composed.") Since there has been no showing of a "class-based, invidiously discriminatory animus," Griffin, 403 U.S. at 102, plaintiff's lack of political activity claim under section 1985 must be dismissed.

Nor does plaintiff's claim of age discrimination state a cause of action under section 1985(3). The Supreme

Court's reasoning in Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366 (1979), where it held that the deprivation of a right created by Title VII could not be the basis for a section 1985(3) cause of action, is equally applicable to plaintiff's age claim which arises under the ADEA, 29 U.S.C. §§621 et seq. To do so would be to undermine the comprehensive plan set out by Congress to remedy claims of age discrimination. To permit plaintiff to proceed under section 1985(3) would permit him to avoid these detailed and specific provisions of the law. Accord Seidel v. Chicago Savings & Loan Association, 544 F. Supp. 508 (N.D. Ill. 1982) (no cause of action under Section 1985(3) for claims of sex and age discrimination); Lyon v. Temple University of the Commonwealth System or Higher Education, 507 F. Supp. 471, 478 (E.D. Pa. 1981) (Novotny analysis equally applicable to claims under Equal Pay Amendments to Fair Labor Standards Act).

For the foregoing reasons, plaintiff's claim of discrimination based upon lack of political activity and age under 42 U.S.C. §1985(3) are hereby DISMISSED.

4. U.S.C. §1988

Although plaintiff has also claimed a cause of action under 42 U.S.C. §1988, that section is only "intended to complement the various acts which do create federal causes of action for the violation of federal civil rights."

Moore v. County of Alameda, 411 U.S. 693, 702 (1973). It also provides for an award of attorney fees in certain actions. Insofar as this Court has dismissed plaintiff's claims under 42 U.S.C. §§1983 and 1985, it is also appropriate to dismiss plaintiff's claim under 42 U.S.C. §1988.

D. MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

In his motion plaintiff moves for leave to file a supplemental memorandum to provide additional evidence of retaliatory conduct on the part of defendants. Insofar as this Court has already determined that a claim of retaliation must be brought under Title VII and does not state a cause of action under 42 U.S.C. §1983, the motion is hereby DENIED.

E. CONCLUSION

For the foregoing reasons, the Court takes the following actions

1. defendants' motion for summary judgment in regard to plaintiff's claim or age discrimination under 29 U.S.C. 216, et seq., DENIED;

2. defendants' motion for summary judgment in regard to plaintiff's claims of retaliation and lack of political activity under 42 U.S.C. §1983 is GRANTED and those claims are DISMISSED;

3. defendants' motion for summary judgment in regard to plaintiff's claims of conspiracy under 42 U.S.C. §1985 is GRANTED and those claims are therefore DISMISSED;

4. defendants' motion for summary judgment in regard to plaintiff's claim under 42 U.S.C. §1988 is GRANTED and that claim is therefore DISMISSED.

5. plaintiff's motion for leave to file a supplemental memorandum is DENIED.

IT IS SO ORDERED.

(signed)

John D. Holschuh, Judge
United States District Court

No. 89-761

Supreme Court, U.S.
FILED
DEC 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

EDWARD E. RICE,
Petitioner,

vs.

OHIO DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21pp

QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments prohibit state officials from considering political factors in deciding whether to promote a classified public employee into an unclassified position.

2. Whether the First and Fourteenth Amendments prohibit state officials from considering a public employee's own prior personal employment dispute in determining whether to promote the classified public employee into an unclassified position.

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No. 89-761

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EDWARD E. RICE,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, David L. Weir and Patrick McCray respectfully request that this court deny the petition for a writ of certiorari ("the Petition") seeking review of the Sixth Circuit's opinion in this case.[1]

[1] The Ohio Department of Transportation is not a party for purposes of the Petition or the appeal before the Sixth Circuit Court of Appeals.

JURISDICTION

This Court has jurisdiction to review the final judgment of the Sixth Circuit Court of Appeals under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Petitioner Edward Rice filed this action against Respondents Weir and McCray on December 23, 1982 alleging that he had been employed at the Ohio Department of Transportation since May, 1969 as a classified employee in the position of Personnel Director III. Petitioner further alleged that on two separate occasions he had requested a temporary work level increase to the position of Administrative Assistant IV. The Administrative Assistant IV position which Petitioner sought is unclassified.

Petitioner asserted claims under 42 U.S.C. §§1983 and 1985 stating that he was denied promotions on the basis of considerations that were in violation of the First and Fourteenth Amendments. Petitioner alleged that he was denied both temporary work level increases because of his age[2], lack of loyalty to the Republican Party of Ohio and for having previously filed a charge of discrimination with the Ohio Civil Rights Commission.[3]

It should be noted that the Petitioner's allegation that both of the employees who received promotions instead of him were either less qualified, or not qualified for the position is erroneous. Since the position of Administrative Assistant IV is unclassified, any determination as to a candidate's qualifications is subjective. The Director, Mr. Weir, not the district deputy director, had total discretion in the selection of the person to be appointed to the position of Administrative Assistant IV.

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[2] Petitioner's age discrimination claim was dismissed by stipulation of the parties and is not before this Court.

[3] Petitioner's charge of reverse sex discrimination which he filed in 1976, was resolved between the parties in 1978.

Petitioner did not allege that he has been discharged, demoted, harassed or punished in any manner because of his lack of loyalty to the Republican Party of Ohio, or for having filed a previous charge of discrimination with the Ohio Civil Rights Commission. Petitioner contends only that he was denied a promotion into the unclassified position of Administrative Assistant IV.

On January 22, 1986 the district court granted the Respondents' Motion for Summary Judgment on the issues of political discrimination and retaliation. On appeal, the Petitioner's sole claim under 42 U.S.C. §1983 was that he was denied promotion to the unclassified position based on political discrimination and retaliation for asserting the reverse discrimination claim.

The Sixth Circuit affirmed the district court's judgment stating that its prior decision in *Messer v. Curci* (en banc), 881 F.2d 219 (6th Cir. 1989) was controlling. In *Messer*, the Court drew a sharp distinction between politically motivated firings and other types of personnel decisions such as failure to hire or rehire based on political considerations.

With respect to the Petitioner's retaliation claim, the Sixth Circuit affirmed summary judgment for the reason that the record did not reveal the existence of a public controversy. The Court stated that the Petitioner's claim was "part and parcel of Mr. Rice's own 'personel employment dispute.' If the First Amendment does not convert every public employee grievance into a matter of public concern, we have been given no reason to suppose that a retaliatory failure to promote Mr. Rice would be unconstitutional" (A-9).[4]

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[4] A copy of the panel opinion is appended to the Petition at A-1, and will be cited herein ("A-[page number]").

REASONS FOR DENYING THE WRIT

I. The Issues Present In This Case Are Not Identical To Those Of *Rutan v. Republican Party of Illinois.*

Petitioner incorrectly asserts that *Rutan v. Republican Party of Illinois*, 58 U.S.L.W. 3185 (October 3, 1989), presents identical questions regarding the promotion issues raised in the instant case. Neither the issues, nor the facts in *Rutan* are identical to those of the instant case. The Ohio General Assembly, in contrast to its Illinois counterpart, has created a statutory distinction between public employment jobs which may be subject to political considerations and those which may not. Ohio Revised Code, Section 124.11 (see Appendix RA1) states:

> The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts thereof shall be divided into the unclassified service and the classified service.
>
> (A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:
>
> . . . .
>
> (9) The deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals, or holding a fiduciary relation to such principals . . .

No such distinction exists in Illinois. Thus, while the issues raised in *Rutan* may appear to be the same as those raised *sub judice*, they differ greatly because Ohio has recognized statutorily what this Court held:

> Both opinions in *Elrod* recognize that party affiliation may be an acceptable requirement for some types of government employment. Thus, if an

> employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency, [427] U.S. at 366.

Branti v. Finkel, 445 U.S. 507, 517 (1980).

In *Messer*, the Sixth Circuit reiterated this Court's holding:

> The Supreme Court cases do not *require* us to find constitutional fault in a system permitting patronage hiring. The options do lay out a rubric for balancing the cost of patronage in the "restraint it places on freedoms of belief and association," *Elrod*, 427 U.S. at 355, 96 S. Ct. at 2680, with the state interests in effective government. *Id.* at 364, 96 S. Ct. at 2685.

881 F.2d, at 222.

The issue thus presented for review *sub judice* differs materially from those issues stated in *Rutan*. The petitioners in *Rutan* question whether the State can use political considerations to deny a promotion to *any* public employee. Petitioner Rice's claim, however, is limited to a situation where the desired promotion is to an unclassified position which the General Assembly has already determined to be properly subject to political considerations.

II. There Is No Division Between The Courts Of Appeal On The Issue Of Whether The Denial Of A Promotion To An Unclassified Position Due To Political Beliefs Or Political Affiliation Violates First Amendment Rights.

Petitioner's claim (Petition at 9) that the Courts of Appeal are sharply divided as to whether a denial of promotion due to political beliefs and political affiliation violates First Amendment rights is also erroneous. Petitioner cites no circuit court case which has addressed the issue of the constitutionality of a denial of a promotion due to political beliefs or affiliation other than *Rutan*. Indeed, the Seventh Circuit's decision in *Rutan*, by Petitioner's own admission, is consistent with the Sixth Circuit's analysis of the issue in the case *sub judice*.

The other cases cited by Petitioner involve issues which differ significantly from those raised by Petitioner. In *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987), the plaintiffs claimed that they were demoted in retaliation for their support of a Mayor's political opponent. In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), the court addressed whether a police officer could be demoted for "intemperately criticizing the police chief in front of another police officer while off duty." *Id.* at 834. In *Lieberman v. Reisman*, 857 F.2d 896, 898 (2d Cir. 1988), the plaintiff claimed that she was denied payment for compensatory time and vacation solely due to her political affiliation.

Each of the cases which Petitioner cites as being in conflict with the Sixth Circuit determination herein, asserts a claim based on some type of retaliation which results from a public employee expressing political beliefs different from his public employer; and address

whether a public employer may impose punishment or retribution for the exercise of permissible free speech. They do not address whether promotion into the unclassified service based in part on political considerations violates the First and Fourteenth Amendments.

Petitioner Rice makes no claim that he did not receive a promotion in retribution for political expressions or political statements which were at odds with Respondents' political beliefs. To the contrary, Petitioner Rice was a member of the *same* political party as Respondents.

III. The Sixth Circuit's Decision Does Not Conflict With The Holding Of The Eighth Circuit In *Greenwood v. Ross.*

Petitioner states that the Sixth Circuit's decision is in direct conflict with the Eighth Circuit's holding in *Greenwood v. Ross,* 778 F.2d 448 (8th Cir. 1985). It is not. In *Greenwood,* the plaintiff claimed that he was discharged in retaliation for filing an EEOC claim. Petitioner Rice makes no claim that he was discharged in retaliation for filing his charge of discrimination.

Moreover, the analysis of the Sixth Circuit is in accord with the prior decisions of this Court:

> The threshold question in such cases, as the Supreme Court has recently emphasized, is whether the speech involves a matter of "public concern." *Connick v. Meyers,* 461 U.S. 138, 146 (1983); *Rankin v. McPherson,* 483 U.S. 378, 384 (1987); see also *Brown v. City of Trenton,* 867 F.2d 318, 321 (6th Cir. 1989). If the speech does not involve a matter of public concern, it is "unnecessary for us to scrutinize" the employment decision. *Connick,* 461 U.S. at 138. Not every job-related grievance of a public employee is a matter of public concern. In *Connick,* for example, the issues raised by the plaintiff's circulation of a questionnaire among her co-workers were "mere extensions of [the plaintiff's] dispute over her transfer" to another position, not issues of broader interest to society at large. *Id.* at 148. (A-7).

Petitioner Rice, similarly, fails to provide any information to distinguish his reverse discrimination charge from any other single-plaintiff discrimination case. Petitioner made his claim to benefit only himself. No attempt or effort was made to make the alleged discriminatory conduct anything other than a "personal employment dispute." As the Sixth Circuit concluded,

"If the First Amendment does not convert every public employee grievance into a matter of public concern, we have been given no reason to suppose that a retaliatory failure to promote Mr. Rice would be unconstitutional." (A-9).

CONCLUSION

For the foregoing reason, the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

OHIO REVISED CODE

§124.11 Unclassified and classified service.

The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts thereof shall be divided into the unclassified service and the classified service.

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

(1) All officers elected by popular vote or persons appointed to fill vacancies in such offices;

(2) All election officers and the employees appointed by boards of elections;

(3) The members of all boards and commissions, and heads of principal departments, boards, and commissions appointed by the governor or by and with his consent; and the members of all boards and commissions and all heads of departments appointed by the mayor, or, if there is no mayor such other similar chief appointing authority of any city or city school district; except as otherwise provided in division (A)(17) or (C) of this section, this chapter does not exempt the chiefs of police departments and chiefs of fire departments of cities or civil service townships from the competitive classified service;

(4) The members of county or district licensing boards or commissions and boards of revision, and deputy county auditors;

(5) All officers and employees elected or appointed by either or both branches of the general assembly, and such employees of the city legislative authority as are engaged in legislative duties;

(6) All commissioned and noncommissioned officers and enlisted men in the military service of the state including military appointees in the office of the adjutant general;

(7)(a) All presidents, business managers, administrative officers, superintendents, assistant superintendents, principals, deans, assistant deans, instructors, teachers, and such employees as are engaged in educational or research duties connected with the public school system, colleges, and universities, as determined by the governing body of the public school system, colleges, and universities;

(b) The library staff of any library in the state supported wholly or in part at public expense.

(8) Three secretaries, assistants, or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistants, or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards, or commissions, except civil service commissions, authorized to appoint such secretary, assistant, or clerk and stenographer;

(9) The deputies and assistants of elective or principal executive officers authorized to act for and in place of their principals, or holding a fiduciary relation to such principals and those persons employed by and directly responsible to elected county officials and holding a fiduciary or administrative relationship to such elected county officials, and the employees of such

county officials whose fitness would be impracticable to determine by competitive examination, provided that this subdivision shall not affect those persons in county employment in the classified service as of September 19, 1961. Nothing in this subdivision applies to any position in a county department of human services created pursuant to sections 329.01 to 329.10 of the Revised Code.

(10) Bailiffs, constables, official stenographers, and commissioners of courts of record, deputies of clerks of the courts of common pleas who supervise, or who handle public moneys or secured documents, and such officers and employees of courts of record and such deputies of clerks of the courts of common pleas as the director of administrative services finds it impracticable to determine their fitness by competitive examination;

(11) Assistants to the attorney general, special counsel appointed or employed by the attorney general, assistants to county prosecuting attorneys, and assistants to city directors of law;

(12) Such teachers and employees in the agricultural experiment stations; such students in normal schools, colleges, and universities of the state who are employed by the state or a political subdivision of the state in student or intern classifications; and such unskilled labor positions as the director of administrative services or any municipal civil service commission may find it impracticable to include in the competitive classified service; provided such exemptions shall be by order of the commission or the director, duly entered on the record of the commission or the director with the reasons for each such exemption;

(13) Any physician or dentist who is a full-time employee of the department of mental health or the department of mental retardation and developmental disabilities or of an institution under the jurisdiction of either department; and physicians who are in residency programs at the institutions;

(14) Up to twenty positions at each institution under the jurisdiction of the department of mental health or the department of mental retardation and developmental disabilities that the department director determines to be primarily administrative or managerial; and up to fifteen positions in any division of either department, excluding administrative assistants to the director and division chiefs, which are within the immediate staff of a division chief and which the director determines to be primarily and distinctively administrative and managerial;

(15) Noncitizens of the United States employed by the state, or its counties or cities, as physicians or nurses who are duly licensed to practice their respective professions under the laws of Ohio, or medical assistants, in mental, tuberculosis, or chronic disease hospitals, or institutions;

(16) Employees of the governor's office;

(17) Fire chiefs and chiefs of police in civil service townships appointed by boards of township trustees under section 505.38 or 505.49 of the Revised Code;

(18) Executive directors, deputy directors, and program directors employed by community mental health boards under Chapter 340, of the Revised Code, and secretaries of the executive directors, deputy directors, and program directors;

(19) Superintendents, and management employees as defined in section 5126.20 of the Revised Code, of county boards of mental retardation and developmental disabilities;

(20) Physicians, nurses, and other employees of a county hospital who are appointed pursuant to sections 339.03 and 339.06 of the Revised Code;

(21) Inspection officers of coal and surface mining operations designated under section 1513.03 of the Revised Code;

(22) The executive director of the state medical board, who is appointed pursuant to division (B) of section 4731.05 of the Revised Code;

(23) County directors of human services as provided in section 329.02 of the Revised Code.

(B) The classified service shall comprise all persons in the employ of the state and the several counties, cities, city health districts, general health districts, and city school districts thereof, not specifically included in the unclassified service. Upon the creation by the board of trustees of a civil service township civil service commission, the classified service shall also comprise, except as otherwise provided in division (A)(17) or (C) of this section, all persons in the employ of civil service township police or fire departments having ten or more full-time paid employees. The classified service consists of two classes, which shall be designated as the competitive class and the unskilled labor class.

(1) The competitive class shall include all positions and employments in the state and the counties, cities, city health districts, general health districts, and city

school districts thereof, and upon the creation by the board of trustees of a civil service township of a township civil service commission all positions in civil service township police or fire departments having ten or more full-time paid employees, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, reinstatement, transfer, or reduction, as provided in this chapter, and the rules of the director of administrative services, by appointment from those certified to the appointing officer in accordance with this chapter.

(2) The unskilled labor class shall include ordinary unskilled laborers. Vacancies in the labor class shall be filled by appointment from lists of applicants registered by the director. The director or the commission shall in his rules require an applicant for registration in the labor class to furnish such evidence or take such tests as the director considers proper with respect to age, residence, physical condition, ability to labor, honesty, sobriety, industry, capacity, and experience in the work or employment for which he applies. Laborers who fulfill the requirements shall be placed on the eligible list for the kind of labor or employment sought, and preference shall be given in employment in accordance with the rating received from such evidence or in such tests. Upon the request of an appointing officer, stating the kind of labor needed, the pay and probable length of employment, and the number to be employed, the director shall certify from the highest on the list, double the number to be employed, from which the appointing officer shall appoint the number actually needed for the particular work. In the event of more than one applicant

receiving the same rating, priority in time of application shall determine the order in which their names shall be certified for appointment.

(C) A municipal or civil service township civil service commission may place volunteer firemen who are paid on a fee-for-service basis in either the classified or the unclassified civil service.